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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 581

LOREN R. GAJEWSKI and MERVIN A. GAJEWSKI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioners respectfully ask this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (App. A, *infra*), is reported at 321 F.2d 261.

JURISDICTION

The judgment of the Court of Appeals was entered on July 26th, 1963 (App. B, *infra*). A timely Petition for Rehearing was denied on August 26th, 1963 (App. C, *infra*). A timely Application to the Court of Appeals for a Stay of Mandate for Thirty days was granted on September 5th, 1963. On September 19th, 1963, Mr. Justice White further extended the time to file the Petition for Certiorari to and including October 25th, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. **Whether It Is Constitutionally Permissible for a United States Attorney to Personally Prosecute His Former Clients in a Federal Criminal Case.**
2. **Whether a Non-Indigent Accused in a Federal Criminal Case Has an Absolute Constitutional Right to Compel a Prosecuting Attorney and a Deputy Clerk to Be Sworn As Witnesses and Respond to Questions.**
3. **If the Right of a Non-Indigent Accused to Compel the Testimony of Witnesses in a Federal Criminal Case Is Not Absolute, What Are Appropriate Standards for Its Discretionary Control?**
4. **Whether Evidence Which Is Confidential under 7 U.S.C. 1373(c) and Which Was Obtained by the Prosecution in Violation of 18 U.S.C. 1905 May Be Used Against a Defendant in a Federal Criminal Case.**

QUESTION TO BE PRESENTED IF CERTIORARI IS GRANTED

5. Whether the Evidence Is Constitutionally or Legally Sufficient to Support the Verdict.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are in their pertinent parts reprinted herein at App. D. *infra*, and are listed below as follows:

United States Constitution, Amendment V.
United States Constitution, Amendment VI.
7 U.S.C. 1373(c).
18 U.S.C. 1905.

STATEMENT OF THE CASE

Petitioners, who are brothers, principally engaged in farming in McKenzie County, North Dakota, were accused under a multi-count indictment filed in the District of North Dakota on October 24th, 1960. Each of the first three counts of the indictment charged both Petitioners with conspiracies committed in violation of 18 U.S.C. 371. The fourth count of the indictment charged the Petitioner Loren R. Gajewski alone with a substantive offense. Count One *charged* Petitioners with conspiring to impede and obstruct the Agricultural Adjustment Act of 1938 by making false representations in violation of 18 U.S.C. 1001. Count Two charged Petitioners with conspiring to violate the Social Security Act. Count Three charged Petitioners with conspiring to violate 18 U.S.C. 1001 by filing false income

tax returns. Count Four charged Petitioner Loren R. Gajewski with making false statements in his 1959 income tax return in violation of 18 U.S.C. 1001 (See App. A, pp. A1, A2, A3). Petitioners were acquitted of the charge under Count Two, but convicted on each of the other counts in the indictment and were each sentenced to terms of two years imprisonment under each count to be served concurrently.

During the trial, Petitioner Loren was represented by employed counsel, but Petitioner Mervin, a lay person, represented himself. The prosecution was represented by Mr. John O. Garaas, United States Attorney for the District of North Dakota and Mr. Glen K. Swanson, Assistant United States District Attorney.

At one point in the trial, after the Government had rested its case in chief, the Defendant Mervin Gajewski called Mr. C. J. Schmidt, Deputy Clerk to the witness stand (T. 2212-3) At that point the Court told Mervin Gajewski to indicate the general line which Mr. Schmidt's testimony would take (T. 2212-5). Mervin Gajewski then told the Court that his purpose was to have the Clerk produce some records from a civil action (T. 2212-8), that the civil actions concerned identical material to that in the criminal case and that there were certain interrogatories involved which were needed by the defense (T. 2213-15). The United States Attorney objected that the material sought was immaterial, irrelevant and prejudicial and because he felt "that this (to have the Clerk testify) would be irregular" (T. 2213-5). The Court then stated its ruling which upheld the objection of the United States Attorney and refused to allow the Defendants to call Mr. Schmidt as a witness on the grounds that "what's the civil file in this matter of a civil case would not be admissible on this hearing as not being material and relevant" (T. 2213-21, 22). Mer-

vin Gajewski was then directed to proceed and was asked the name of his next witness (T. 2213-25).

Thereafter, Petitioners attempted to call as a witness on their behalf, the United States Attorney who was present in court (See App. E, *infra*, for the entire record excerpts concerning this matter). When the Court inquired the purpose of this, it was told that the testimony was necessary "to make a proper defense". The Court was further informed that the prosecutor had "been involved with these lands in question and with the people in question." The Court denied the request and subsequently the Court's ruling was challenged and Petitioners' further efforts to explain were cut off by the Court although it was stated by Petitioner that one reason for calling the prosecutor was that the United States Attorney had had conversations with Petitioners prior to the time he took office and at that time he was neighbor of the Petitioners and that he obtained confidential information making it easier for him to prosecute the case. Then the United States Attorney volunteered and was permitted by the Court to state his version of the conversation he had had. He did not, however volunteer to the Court that he had previously acted as Petitioners' attorney. He disclosed those facts for the first time on appeal. The Court of Appeals however, went outside the record to accept the United States Attorney's account of his representation of Petitioners. The Petitioners were never afforded an opportunity in court to contradict these extra-judicial findings (See App. F, *supra*, Petition for Rehearing).

At one point in its opinion, the Court of Appeals admits to going outside the record in accepting the United States Attorney's version of the affair (App. A, *infra*, p. A14, fn. 9). The Court of Appeals does not admit, but it is

nevertheless true, that their following language is completely without support or basis in the record on appeal:

> "Here Mr. John Garaas, the United States Attorney for the District of North Dakota, had represented the Appellants as a private attorney on only one occasion—an action in 1952, involving cancellation of oil leases on Appellants' land. It was not until July, 1961, that Mr. Garaas became United States Attorney, some eight months after the indictment in this case was returned." (App. A, *infra*, p. A11).

Under the indictment, Appellants were charged with the crime of conspiring to defraud the United States by "impeding, obstructing and attempting to defeat the lawful operation of an Act of Congress and the intent and purpose thereof, to-wit: The Agricultural Adjustment Act of 1938 as amended and supplemented (U.S.C.A. 1281 *et seq.*) and to commit certain offenses against the United States in violation of said Agricultural Adjustment Act of 1938 aforesaid and rules and regulations promulgated thereunder and in violation of Section 1001 of Title 18, U.S.C." With regard to this charge the United States Attorney claimed in his opening statement that he would show that there were two farms involved which were operated as a unit, one of which was registered with the McKenzie Agricultural Stabilization Conservation Committee and the other which was not (T. 22-11, 13). He said that he would show that Defendants sold approximately 10,000 bushels of wheat from one farm under the marketing card of the other illegally (T. 23-17). The United States Attorney said he would show by "self-made statements" by the Defendants the foregoing (T. 23-9). Furthermore, the prosecutor said that he would show the Defendants raised wheat in total disregard of the program and produced in excess of the acreage allotment as given by the County Committee from

the ASC Office of McKenzie County (T. 25-4), and that the ASC Office did not discover until 1957, that the Defendants were operating illegally (T. 24-7).

It became clear during the course of the trial that the United States Attorney intended to prove these charges against the Appellants by making extensive use of records of the McKenzie County ASC Committee maintained and kept by them in the ordinary course of business. During the course of the trial, 229 exhibits were offered by the Government and received into evidence (T. Index J to Z). The first 54 exhibits (through 55 inclusive less Exhibit 5), of the Government's exhibits were taken from the files and records of the McKenzie County ASC Committee (T. Index J through M), and in addition, Exhibits 212, 213, 223, 224, 225, 226, 227 and 228 (T. Index Y-13), making a total of 58 exhibits which were taken from the files and records of the ASC Office. The Court was of the view that the ASC records were admissible under the provisions of Section 1732, 18 U.S.C. and Section 1733, 18 U.S.C. (T. 87-15).

All of the foregoing exhibits were admitted into evidence through the testimony of Agricultural Department employees, or rather Agricultural Stabilization Conservation Committee employees. It was clear from all of the evidence elicited that the ASC records contained data "reported to or acquired by the Secretary (of Agriculture)." The ASC records produced many exhibits specifically provided for under Title 7, Section 1373(b), including "report of acreage" (Government Exhibits 1, 7, 8, 38, 46 and 48), "wheat record and report" (Government Exhibits 22, 23, 25, 43 and 225), "record of wheat sales" (Government Exhibit 34). Additionally there were items of personal correspondence by the Defendants (Government Exhibits 15, 24, 32, 44, 53 and 54).

There was no proof or evidence offered during any part of the trial that the data reported acquired by the County ASC Office, which was involved in the aforesaid exhibits, had been deemed by the Secretary of Agriculture to be relevant.

REASONS FOR GRANTING THE WRIT

The case is important. The case is especially important because of the unwarranted qualification upon the Sixth Amendment rights of a non-indigent accused to compel the testimony of witnesses on his own behalf. In this case, the Defendants called as witnesses on their behalf, the Deputy Clerk of the Court and the United States Attorney. Both of these individuals were present in the Courtroom throughout the trial, and the prosecutor did have an assistant with him in court. The announced purpose of calling the Deputy Clerk was to have him identify records in a civil case which involves some of the same fact questions present in this matter. The trial court made an advance determination of relevancy of these documents without ever seeing them and refused to allow the Deputy Clerk to be sworn upon objection by the United States Attorney. The Court also made certain inquiries of the Defendants concerning their reason for wanting the United States Attorney to testify. Representations were made to the Court in that he was important to the defense and that he had had dealings with these Defendants, was acquainted with some of the matters in the case and was necessary to the defense, and further that there had been a conversation between them prior to the time that the United States Attorney took office. The Defendants told the Court that the United States Attorney "got some confidential information that may make it easier to prosecute this case". The United States Attorney disclaimed such knowledge to the Court and his unsworn state-

ment in that regard was accepted by the Court who refused to permit him to be sworn as a witness.

It is the position of the Petitioners that they had an absolute right under the Sixth Amendment to compel testimony on their behalf. Opposed to this view, the Government contended that the Sixth Amendment was not applicable because no subpoena had been issued for the witnesses and that this was simply a matter of the trial court exercising its authority and duty to conduct the trial in an orderly manner, and keep immaterial matters out of the record (App. A, p. A12). Because these witnesses were present in Court, it was not necessary to issue subpoenaes for them; *Howson* v. *Marlene Blouse Corp.*, 106 N.Y.S. 2d 774, 200 Misc. 242 (1951). The rights of accused under the Sixth Amendment to compel the attendance of witnesses, would mean very little if as held by the courts below, witnesses could be compelled to attend court but could be prevented by the court from testifying. The position of the Petitioners in this matter is identical to that announced by the Court in *United States* v. *Seeger*, 180 F. Supp. 467 (S.D. N.Y. 1960). That case held that it was for the defendant to choose who his witnesses would be and that the materiality of the witnesses' proferred testimony must rest with the trial judge after the witness has been sworn, questions asked and objections made. This is to say that the accused under the Sixth Amendment is not required to make some sort of an offer of proof prior to the time he calls the witness to the stand. His right to place the witness on the stand and ask questions, is absolute. If proper objection is noted to the question, the matter has then reached the evidentiary stage where an offer of proof or some other showing of relevancy might be required. If the position of the trial court were to be sustained here, then the lower courts would have full license to require de-

fendants to give the prosecutor a preview of the defense evidence.

On this point, the lower court relied upon just three cases and they are distinguishable. It does not appear that this court has ever passed upon the question. *May* v. *United States*, 175 F.2d 994 (D.C. Cir. 1949), is distinguishable because the witness in that case was the Secretary of State of the United States and he was not present in court. The other case relied upon by the lower court was *Overholser* v. *DeMarkos*, 149 F.2d 23 (D.C. Cir. 1945), which is inapplicable because it was a civil proceeding in which the litigant was not an "accused" within the meaning of the Sixth Amendment. The lower court also placed some reliance upon *Fisher* v. *United States*, 231 F.2d 99 (9th Cir. 1956), which is inapplicable because the decision on this point was dictum, the prosecutor was called for impeachment purposes only and it was clear on the record that his testimony would not serve that purpose, it did not appear that a right under the Sixth Amendment was claimed and Fisher was awarded a new trial.

Even if it can be said that the right of an accused to compel the attendance and testimony of witnesses under the Sixth Amendment is a qualified one, there is a need for this court to impose proper standards for the exercise of that discretion. *Overholser* v. *DeMarkos, supra*, does this for civil cases, but even by those standards, the Court in this case clearly abused its discretion. Overholser indicates that it is the witness who is to protest if he cannot give relevant information. When the witness makes such a showing, then the court should require a statement from the party who calls him, disclosing what evidence is expected to be obtained. If the witness can give no relevant testimony, the court need not require his attendance, but in exercising its discretion, the court is required to resolve all

doubts in favor of the party calling the witness and failure to inquire into the matter where a showing is made that a person has no relevant testimony to give is an abuse of discretion. The discretion sanctioned by the lower court here was particularly poor because it did not even measure up to the standards imposed for civil cases by Overholser. Surely in a criminal case where an accused has rights under the Sixth Amendment, the standards ought to be higher. The trial court should have at least looked at the exhibits which the defendants sought to introduce through the Deputy Clerk. The mere fact that they were from a civil file did not make them inadmissible and as a matter of fact, several of the Government exhibits were from civil files (Exhibits 65, 66, 67, 68, 69 and 70). The trial court made no independent inquiry either into the natter of exhibits or the matter of the prosecutor's testimony. The court relied exclusively upon the unsworn statements and representations of the United States Attorney.

The Petitioners here are not indigent and the problem presented is not one under Rule 17(b) of the Federal Rules of Criminal Procedure involving the possible unwise expenditure of public money in connection with the subpoena for witnesses at Government expense. Here the problem is, does a non-indigent accused in a federal criminal case, have an absolute right to compel witnesses to take the stand, be sworn, and, have questions propounded to them. If not, then it is for this Court to establish the standards by which those Sixth Amendment rights may be qualified.

In this case it was charged that the United States Attorney had gotten confidential information from the Defendants prior to the time he took office. He later admitted on appeal, although he did not disclose it to the trial court, that he had in fact acted as petitioners' attorney at a time

prior to taking office. His representation of that relationship however, was that it was completely innocuous and non-prejudicial to the Petitioners. The Petitioners have never had an opportunity to refute those representations in court. The Court of Appeals went outside the record to accept the statements of the United States Attorney (See p. 5 of this Petition). The trial court prevented the Petitioners from questioning the United States Attorney under oath and accepted his word as against the word of Petitioners.

Beyond the fact that Petitioners were prevented by the Court from placing the prosecutor on the witness stand, there is an extremely important public policy question involved here. That is, should a United States Attorney be permitted to *personally* prosecute his former clients. The lower court said yes because it found there was no substantial relationship between the matters involved in the prosecution and the United States Attorney's former representation of Petitioners. Petitioners claim that he obtained confidential information and they were never permitted to interrogate the United States Attorney under oath concerning the matter. Apart from this claimed breach of confidentiality, there is the matter of fidelity required of all lawyers to their former client. See *Packer* v. *Rapoport*, 88 N.Y.S. 2d 118, reversed on other grounds 275 App. Div. 820, 89 N.Y.S. 2d 703 (1949), and Canons 6 and 37 of the American Bar Association Canons of Ethics. The United States Attorney here had assistants, one of whom was in court and any of whom could have prosecuted the case. Not only does the fair administration of federal criminal justice require that no United States Attorney personally prosecute his former clients, but the appearance of fairness, which is so essential to our judicial systems, also demands it.

The case is also important because of the fact that the Defendants were convicted upon evidence which was confidential under 7 U.S.C. 1373(c) and obtained by the Government in violation of 18 U.S.C. 1905.

Under Title 7, Section 1373, U.S.C.A., farmers engaged in the production of wheat for market are required to furnish proof of their acreage, yield, storage and marketing in the form of records, marketing cards, reports, storage under seal and such other things as the Secretary of Agriculture may prescribe. These reports and records were filed by the farmers with their local County Agricultural Stabilization Conservation Committee. These records are required to be kept confidential under Title 7, Section 1373(c), U.S.C.A., which provides as follows:

> "All data reported to or acquired by the Secretary pursuant to this section shall be kept confidential by all officers and employees of the Department, and only such data so reported or acquired as the Secretary deems relevant shall be disclosed by them, and *then only in a suit or administrative hearing* under this chapter." (Emphasis supplied).

Of the sixty-two Government exhibits above indicated which were taken from files and records of the ASC Committee, none were shown to have been deemed "relevant" by the Secretary. This case of course, was a criminal prosecution and was not a "suit or administrative hearing under this chapter" (Title 7). It should be noted that of the Government exhibits referred to above are actually of the type specifically designated in 28 U.S.C. 1373(b) (See Statement of the Case).

The question thus presented is one of great importance to the thousands of people who must operate under the Agricultural Adjustment Act of 1938, and insofar as we are aware, the claim made herein has never before been ad-

judicated. Perhaps because of the historic independence of American farmers, Congress has always been reluctant to impose criminal sanctions upon them through agricultural controls. It is true that there are some criminal sanctions to be found in Title 7, U.S.C., but they are wholly inapplicable to the problem here. In this case, the Government did by indirection what it could not have done by direction. Disclosures required to be made by wheat farmers to the Agriculture Department are as indicated, confidential unless deemed relevant by the Secretary and in that case they can only be used in a suit or administrative hearing under Title 7. Here the records were used to convict the Defendants for crimes under Title 18. These records could only have been obtained by the Government prosecutor in violation of the statute making them confidential and in violation of Title 18, Section 1905.[1] No consent to the use of those records before the grand jury returned the indictment or the trial itself was ever given by these Petitioners. Without these records, Petitioners could not have been convicted.

In *McNabb* v. *United States*, 318 U.S. 332, this court held that when the F.B.I. violates the statute requiring them to bring arrested persons immediately before the United States Commissioner, the conviction must be set aside when based upon evidence obtained in violation of that statute. In *Mallory* v. *United States*, 354 U.S. 449, another conviction was set aside on the grounds that it was obtained by federal officers acting in violation of the Federal Rules of Criminal Procedure. The situation here seems substantially comparable. Congress has declared that the records which it requires wheat farmers to fur-

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1. The Court of Appeals refused to recognize Petitioners' claim that the evidence was illegally obtained by the prosecutor (App. C, *infra*).

nish to the Department of Agriculture be confidential. It further makes it a misdemeanor for government agents to disclose such information, and yet the information was disclosed by the Department of Agriculture in this case to the prosecutor who presented it to the grand jury and later to the Court and jury which convicted the Petitioners. This Court ought to say that such frustration of Congressional intent can not be tolerated, that convictions cannot be obtained by violating federal statutes.

CONCLUSION

For all the foregoing reasons stated, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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Attorney for Petitioners.

October, 1963.